Filed 6/15/07 P. v. Marquez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROGER EMILIO MARQUEZ, Defendant and Appellant.	B190013 (Los Angeles County Super. Ct. No. BA264743)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and James William Bilderback II, Deputy Attorneys General, for Plaintiff and Respondent.

_____

Appellant Roger Emilio Marquez was convicted of the first degree murder of his pregnant girlfriend, Noelle Chagolla.[1] He contends: (1) The trial court should not have permitted the prosecutor to re-create before the jury the position of Chagolla's body when a sheriff's deputy first found it. (2) His Sixth Amendment right to confrontation was violated, under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), because a deputy county coroner testified, without objection, both as to the results of the autopsy he conducted and as to the findings that were made by a sexual assault consultant from his office. (3) There were numerous errors in the CALCRIM instructions that were given.

We find that, assuming there was any error in the re-creation of the body's position, there was no prejudice, due to the overwhelming evidence of guilt. We reject appellant's other issues, and affirm.

PROCEDURAL HISTORY

Appellant was originally charged with two counts of murder, based on killing Chagolla and the fetus, while personally using a knife. There also were two special circumstance allegations, multiple murder and torture. The second murder count and the special circumstance allegations were stricken prior to trial, pursuant to Penal Code section 995.[2] The first trial ended with a mistrial after the jury deadlocked 11 to one for guilt. At the second trial, the jury found appellant guilty of first degree murder and the knife enhancement. He was sentenced to 25 years to life in prison for murder, plus one year for the knife enhancement. This appeal followed.

FACTS

1. Background

Chagolla died on Sunday, April 14, 2002, from multiple stab wounds. She had lived with appellant for a year, in the converted garage of his mother's home. He was 22 years old, and she was 21 years old. She slept either with appellant in his room or with

---

1 Chagolla's first name is spelled both "Noelle" and "Noel" in the record.

2 Subsequent code references are to the Penal Code unless otherwise stated.

her six-year-old daughter, D., in a bedroom inside of the house. Appellant's mother slept inside the house as well. Appellant was not D.'s father.

Chagolla loved appellant. She had recently discovered that she was pregnant and was happy about it. Appellant had a very different reaction, demonstrated by numerous incriminating statements in the weeks prior to Chagolla's death.[3]

One of the statements was made in March 2002, while appellant was smoking crystal methamphetamine in his room with a female friend. The friend had arrived to take appellant to D.'s birthday party, which was in progress elsewhere. Appellant became irritated when Chagolla called him four or five times on his cell phone. He told his friend that Chagolla "was bugging him." He said "[t]hat sometimes he wanted her just to go away and that he felt like stabbing her." He held his hands out and made a thrusting gesture while he made that statement. Then he said he was joking. He had previously told the friend that he wanted Chagolla out of his house and out of his life. He thought D. was "bratty" and he was unhappy that Chagolla had a learning disability that meant he had to read to her.

Appellant made another incriminating statement to two custodians at the school where he was performing community service. He said that he did not want to be with his girlfriend any more, but she did not want to break up with him; she was pregnant, but he did not want the baby; he was upset about the possibility of child support; and he had cheated on his girlfriend with other women, but she always forgave him.

Appellant made another such statement to Chagolla's female cousin. She came to the house a few weeks before the homicide, after Chagolla phoned her to complain that appellant was hitting her. When the cousin arrived at appellant's home, appellant and Chagolla were still arguing and D. was crying hysterically. Chagolla told her cousin that appellant had burned her finger with a curling iron. Appellant said the burning was "an accident," but Chagolla had hit him on the head with a shoe. He told the cousin that he

---

3 Subsequent events occurred in 2002 unless otherwise stated.

hated Chagolla and wanted her to leave his mother's house but she did not want to go. The cousin tried to calm the situation down and left with D.

A few days before the killing, while holding a 10-inch knife, appellant told a male friend that "he was going to do something that would put him in prison for a long time." The friend thought that appellant was joking.

Finally, in April 2002, appellant told his sister-in-law that he wanted Chagolla to move out; however, his mother wanted *him* to move out and wanted Chagolla and D. to remain in the house.

2. Events on the Day of the Homicide

Around 6:15 a.m., as appellant's mother was leaving the house for the day, appellant arrived at home. He had not spent the previous night there, but Chagolla had. D. was not home, as she was spending the weekend with an aunt.

Around 9:30 or 10:00 a.m., appellant and Chagolla chatted with two neighbors outside of the house. Appellant did not appear angry.

Around noon, neighbors were surprised to see smoke coming from the house's chimney, as it was a hot day. One of the neighbors knocked on the door of the house to see if there was a fire. The wooden front door and the security door were slightly ajar. There was no answer. Except for the smoke, the neighbors noticed nothing unusual that day.

D. and her aunt arrived at the house three different times that day: at noon, between 4:00 and 6:00 p.m., and at 8:00 p.m. There was no response to their knocks on the door, so they returned to the aunt's house.

About 7:00 or 7:30 p.m., appellant arrived at the home of another male friend. He had previously told this friend "that he felt he was being trapped" by Chagolla. On this occasion, he said that he had "messed up," and needed to take a bus out of town. He asked to borrow a car, or be given a ride to the bus station. The friend refused and appellant left.

Shortly before 8:29 p.m., a neighbor saw appellant standing outside of the house. He asked for a cigarette, and the neighbor gave him one. Sheriff's Deputy Bruce Strelow

drove up in response to a 911 call that appellant had placed. Appellant told Strelow that his girlfriend was inside the house, "tied up and dead."

Strelow called the paramedics and went into the house with appellant. They walked together to a bedroom. Strelow saw a bundle of blankets in the middle of the floor, tied with a knot. Appellant said the bundle was his girlfriend. Strelow kneeled down, untied the knot, reached his hand inside, and touched Chagolla's dead body. He left the room with appellant and waited for the paramedics. Nobody else was in the house. Appellant's mother returned home at 9:00 p.m.

3. Other Evidence

There were two rings on Chagolla's fingers. Nothing was missing from the house. It was neat and orderly, with no sign of forced entry. There were ashes and a piece of burned material in a fireplace. There was no blood on the material. Its fabric resembled the thermal fabric of a shirt that appellant sometimes wore.

In addition to the blankets, there was a sleeping bag around Chagolla's body. The blankets and sleeping bag were normally found in appellant's room.

The autopsy showed that Chagolla was stabbed 26 times. Eight of the wounds were deep enough to be classified as fatal. Those wounds were in her eye, neck, chest, and back. She also had defensive wounds on her hands and arms. She was pregnant. Toxicology reports came back negative for alcohol and narcotics. She had engaged in sexual activity close to the time of death, but there was no evidence of forcible sexual assault.

Appellant, his mother, and Chagolla had keys to the house. At the trial, appellant's mother testified that she did not remember seeing Chagolla's key after the incident, and did not recall talking with appellant about it. That testimony was contradicted by testimony from the investigating officer, Detective Elizabeth Smith. Smith testified that appellant's mother telephoned her after visiting appellant at the jail. The mother told her that appellant had tried to convince her that a set of keys was missing, but she knew that her own keys, appellant's keys, and Chagolla's house key were at the house. Smith went to the house and personally saw all those keys there.

Finally, at the trial, the prosecutor had a female sheriff's deputy of approximately Chagolla's size sit down in a knotted bundle of blankets, to demonstrate Chagolla's position when Strelow first found her.

No defense was presented.

DISCUSSION

1. The Re-creation of Chagolla's Position in the Blankets

Appellant contends that the trial court abused its discretion when it allowed the re-creation of the position of Chagolla's body inside the bundle of blankets, as the re-creation was cumulative of other evidence, and "the conditions of the demonstration were not substantially similar to those which gave rise to the issue on which the evidence was offered."

A. The Record

Before the second trial started, defense counsel objected to the re-creation of the position of the body, which had been permitted at the first trial. The trial court stated that it had seen the re-creation at the first trial, and thought it had been conducted in a professional manner, and had been "helpful," to show the jury what the bundle looked like when Strelow first saw it. Defense counsel objected that the demonstration was misleading, as it was not an exact duplication of what Strelow saw, and it was unnecessary, as Strelow would testify he could not see inside the bundle when he first saw it, and there was no issue about that fact. The trial court ruled that it would allow the re-creation, as it was helpful to see the bundle "in a three dimensional setting." It promised to tell the jury that it was seeing "a reasonably accurate depiction," rather than "an exact duplication."

At the trial, Strelow described finding Chagolla's body in the bundle of blankets. He said that a photograph, People's 22, showed Chagolla as she appeared, inside of the bundle.

Detective Smith testified that she took the blankets from People's 22 out of the crime lab's storage facility and traced their dimensions onto butcher paper. She placed the butcher paper patterns onto two new, larger blankets, and cut the new blankets down

to the same size as the patterns. She then located a female deputy sheriff, Sharon Anda, who was approximately Chagolla's size. Chagolla was 4 feet 10 inches tall and weighed 118 pounds. Anda was 5 feet 1 inch tall and weighed 108 pounds.

The trial court then asked Deputy Strelow to come forward. It told the jury that Smith, Anda and Strelow were going to "attempt to re[-]create a reasonably accurate depiction of what [Strelow] saw when he entered the room." Smith placed one blanket on the bottom, and offset the second blanket from it. Following instructions, Anda sat down on the blankets, with her head pointed "in a fetal position." The prosecutor picked up the corners of the blankets, tied them in a knot, and asked Strelow if the bundle showed what the deputy had seen. He responded:

"Her neck was nearly severed so being dead she was a lot more flexible. She was folded up tighter than this. I couldn't see her head." He then described the position of Chagolla's body, feet, and head. He repeated how he walked through the house, entered the bedroom, and saw the bundle. He demonstrated how he untied the knot and reached his hand inside. Chagolla's neck was "severed almost all the way off," and he could see her long hair. He touched her neck, and got blood on his hand. Then he left the room with appellant, and waited for the paramedics.

The prosecutor mentioned the re-creation very briefly during his lengthy final argument. He reminded the jury that, when Strelow first arrived, appellant said that his girlfriend was inside the house, tied up and dead. As Strelow could not see Chagolla inside of the bundle when he entered the bedroom, as was also shown by the re-creation, the prosecutor argued that appellant must have put Chagolla into the bundle, since appellant knew that Chagolla was in there. He also argued that appellant put Chagolla into the bundle because he wanted to remove her from the house, but was thwarted from doing that because his friend refused to loan him a car.

B. Analysis

If a proper foundation is laid, a prosecutor may use demonstrative evidence to illustrate and clarify a witness's testimony. (*People v. Roldan* (2005) 35 Cal.4th 646, 708-709; *People v. Barnett* (1998) 17 Cal.4th 1044, 1135.) Assuming that the

appropriate foundation was made, we still question the need for the re-creation, as its purpose was to show that Chagolla could not be seen inside the knotted bundle, and that fact was established through Strelow's testimony. Indeed, respondent impliedly recognizes that the re-creation was cumulative, through these words: "Here, the significant fact illustrated by the demonstration, that it was impossible to identify the person in the bundle without first untying it, was irrefutably established by the uncontradicted testimony of Deputy Strelow."

We need not analyze the issue in detail because, even if the re-creation should not have been permitted, it caused no prejudice, due to the overwhelming evidence of guilt.

Appellant was the only person with a motive to kill Chagolla, as she was pregnant, he wanted her to move out, and she refused to do so. Prior to the killing, he told various people that he felt trapped, hated her, wanted her out of his life, felt like stabbing her, was unhappy about having to pay child support, planned to do something with a knife that would lead to a long prison term, and was upset that his mother wanted him to move out but wanted Chagolla to remain in the house. He and Chagolla were alone together at the house when she was killed. He mysteriously burned his shirt in the fireplace around noon, even though it was a hot day, which suggested that he tried to destroy evidence. Most significantly, he told a friend that evening that he had "messed up" and needed to leave town. Chagolla's body was in a bedroom of the house, but it was wrapped in blankets and a sleeping bag from appellant's room in the garage. There was no evidence that anyone broke into the house, or that anything was missing.

Given the overwhelming nature of the evidence, it is not reasonably probable that the re-creation caused any prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. The Confrontation Issue

We also reject appellant's argument that a violation of *Crawford*, *supra*, 541 U.S. 36, occurred during the testimony of Dr. Ajay Panchal, the deputy medical examiner who performed the autopsy.

Panchal described the stab wounds in detail, gave the results of the toxicology tests, and said that Chagolla was pregnant. The prosecutor then asked, "[W]as a sexual

assault examination done on [Chagolla's] body?" Referring to a report, Panchal testified that "the impression of the consultant" was that there was evidence of recent sexual activity, but no evidence of forcible sexual assault. During cross-examination, Panchal added that the examination on sexual issues had been conducted by a "sexual assault consultant," who was a different member of the county coroner's office.

Assuming that the issue about the consultant's opinion was not waived, for lack of an objection, any *Crawford* error was harmless beyond a reasonable doubt (*Chapman v. California* (1966) 386 U.S. 18, 24), due to (a) the overwhelming evidence of guilt that was summarized in part 1, *ante*, and (b) the relative lack of importance to the prosecution's case of the consultant's opinion.

3. Instructional Issues

Appellant maintains that there were numerous errors in the CALCRIM instructions, the errors were prejudicial, and, if the issues were waived for lack of an objection, his trial counsel rendered ineffective assistance. We assume that the instructional issues were not waived but find no merit in them. We list them here.

(1) Appellant complains that the jury's province was improperly invaded by this sentence in CALCRIM 200: "I will now instruct you on the law that applies to this case."

(2) He maintains that the jury was improperly coerced into reaching a verdict by this sentence in CALCRIM 200: "You must reach your verdict without any consideration of punishment."

(3) He argues that the jury's function was usurped by language in CALCRIM 223, stating that both direct and circumstantial evidence are acceptable, and neither type of evidence is entitled to greater weight than the other.

(4) He makes several attacks on CALCRIM 224, which applies the reasonable doubt standard to circumstantial evidence, and tells the jurors to use the reasonable conclusion that points to innocence, if there are reasonable conclusions that point both to innocence and guilt. Appellant contends that the jury might be misled into thinking that the same principles do not apply to direct evidence; the instruction erroneously shifts the burden of proof by referring to conclusions of "innocence" or "guilt," instead of

conclusions of "not guilty" and "guilty"; and the instruction improperly states that the jurors must be "convinced" of guilt beyond a reasonable doubt, because that is different from requiring the jurors to "find guilt beyond a reasonable doubt."

(5) He maintains that eyewitnesses are given "a false aura of credibility" by this sentence in CALCRIM 226: "People sometimes honestly forget things or make mistakes about what they remember."

(6) He complains about this sentence in CALCRIM 251: "Every crime charged in this case requires proof of the union, or joint operation, of act and wrongful intent," because it does not state that "the union of act and intent applied to the union of act **or** conduct."

(7) He maintains that jurors might think the defense is required to produce "some evidence," after hearing this sentence in CALCRIM 300: "Neither side is required to call 'all' witnesses who may have information about the case or to produce 'all' physical evidence that might be relevant."

(8) He contends that the following sentence in CALCRIM 302 is an incorrect statement of law: "[D]o not disregard the testimony of the greater number of witnesses, or any witness, without a reason . . . ."

(9) He argues that, by using the word "may" instead of "must," the following sentence in CALCRIM 316 is an incorrect statement of law: "If you find that a witness has committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness's testimony."

(10) He contends that, since a defendant does not have the burden to argue that the case was not proven, and need not testify, the use of the word "argue" is incorrect in this sentence of CALCRIM 355: "[The defendant] may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt . . . ."

(11) He attacks the motive instruction, CALCRIM 370, which states: "The People are not required to prove that the defendant had a motive to commit the crime charged. In reaching your verdict you may, however, consider whether the defendant had

a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty." His basic arguments are that the instruction was coercive, improperly shifted the burden of proof, and could lead to a verdict of guilt based on motive alone.

(12) He complains about this sentence in CALCRIM 220: "You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial." He argues that the jury might think that bias for some other reason is permissible.

(13) He maintains that the words "must . . . decide" in the following sentence of CALCRIM 3145 is coercive: "If you find the defendant guilty of the crime charged in Count 1, you must then decide" whether the arming enhancement was proved.

(14) He argues that most of the CALCRIM instructions are erroneous because they refer to the jurors collectively as "You," instead of "fram[ing] the principles in terms of individual juror responsibility."

We have considered the above instructional issues and reject them. We also reject appellant's contention that his counsel was ineffective for failing to object to the instructions, as appellant has not met the test of *Strickland v. Washington* (1984) 466 U.S. 668.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J. BOLAND, J.